No. 92-2058

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HAWAIIAN AIRLINES, INC.,

Petitioner,

v.

GRANT T. NORRIS,

Respondent.

and

PAUL J. FINAZZO, HOWARD E. OGDEN and HATSUO HONMA,

Petitioners,

v.

GRANT T. NORRIS,

Respondent.

On Writ Of Certiorari
To The Supreme Court For the State Of Hawaii

BRIEF OF THE STATE OF NEW JERSEY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Hawaii Supreme Court erred in concluding that respondent's state law wrongful discharge claims were not preempted by the Railway Labor Act, 45 U.S.C. § 151 *et seq.*

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INTEREST OF AMICUS CURIAE

The State of New Jersey has a fundamental interest in securing and maintaining the peaceful, orderly and efficient operation of freight and passenger rail service to and from its territory. Geographically situated in a densely populated region, with significant industrial and agrarian economic sectors, the diversified economy of New Jersey has long depended on the existence of an efficient and orderly regional and national railroad transportation system. This transportation system moves New Jersey-produced goods in interstate commerce and provides the State's citizens and economy with efficient and uninterrupted access to the national economy. The Northeast's integrated regional economy has created in New Jersey, as well as in adjoining states, a large commuting labor force travelling daily by railroad service to and from New Jersey in interstate commerce. The efficient and disruption-free movement of these passengers and freight is an essential and important element of the development of New Jersey's economy and the Legislature of this State has declared that "a sound, balanced transportation system is vital to the future of the State and is a key factor in its continued development." N.J.S.A. 27:1B-2.

Pursuant to the State's Legislature's declaration in New Jersey's Public Transportation Act of 1979, N.J.S.A. 27:25-1 *et seq.* that "it is the responsibility of the State to establish and provide for the operation and improvement of a coherent public transportation system in the most efficient manner[,]" the State of New Jersey operates through the New Jersey Transit Corporation an extensive intrastate and interstate transportation network. New Jersey Transit Rail Operations, a subdivision of New Jersey Transit, and its rail employees are governed by the comprehensive federal scheme enacted by

Congress to regulate this nation's interstate railroad industry.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The writ of certiorari presently before the Court originates from the decision of the Supreme Court of Hawaii in *Norris v. Finazzo, et al.*, 842 P.2d 634 (Haw. 1992) and *Norris v. Hawaiian Airlines, Inc.*, its unreported companion case. The Court below ruled that the Railway Labor Act, 45 U.S.C. § 151 *et seq.* does not preempt Hawaii's wrongful discharge law which permits an action in tort for the violation of Hawaii's Whistleblowers' Protection Act. The matter arose after respondent Norris was fired from his employment as a mechanic with Hawaiian Airlines and filed a lawsuit alleging that he was dismissed due to reporting safety violations at the airline to the Federal Aviation Administration. In ruling that the Railway Labor Act did not preempt Hawaii's law, the court below relied on *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), which established the preemption standard used in the Labor Management Relations Act, 29 U.S.C. §§ 141-188. For the reasons set forth herein, *amicus* State of New Jersey respectfully submits that the Supreme Court of Hawaii erred and should be reversed.

The resolution of this dispute has far reaching consequences to the labor relations of rail and air carriers in interstate commerce. Respondent and the Solicitor General seek a declaration by the Court that would allow the States to

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[1] While the Railway Labor Act clearly governs labor relations in both the airline and railroad industry, this brief in support of the petitioner will focus on the railroad side of the Act.

regulate the employment relationship between carriers and their workers by permitting the imposition of local employment tort laws upon interstate carriers. Such state regulation of the railroad and airline industry, however, is directly contrary to the express language of the Railway Labor Act, which was enacted by Congress to prevent any labor disruption to interstate commerce or to carriers engaged therein. The historical record and this Court's jurisprudence concerning the Act clearly establish that Congress desired that all railroad and airline labor disputes be resolved and adjusted by labor and management in the railroad industry pursuant to the specific scheme established by Congress and without resort to the courts. Indeed, the supervisory role granted by Congress to the Federal courts under the RLA is so limited that the Court has noted that Federal judicial review under the Act is "among the narrowest known to the Law." Quite clearly then, respondent's demand that the States and their courts be given a greater role than the Federal courts possess in this highly federalized area is incongruous with the purpose and express language of the Act.

The respondent and the Solicitor General's reliance on a myopic reading of this Court's decision in *Consolidated Rail Corporation v. Railway Labor Executives' Association ("Conrail")*, 491 U.S. 299 (1989) must not serve as the basis for the uprooting of the long existing strict limitation on the States' regulation of railroad and airlines' industrial relations. Quite the opposite from respondent's contentions, this Court's *Conrail* decision has only strengthened the Railway Labor Act by holding that a "minor" dispute under the Act occurs where a discharge or an adverse employment action are "arguably" permitted by the contract of employment, *i.e.*, that the claim by the employer is not frivolous, not in bad faith or not obviously insubstantial. As the gravamen of wrongful discharge actions is the termination of the contract of employment, an employer has a light burden to demonstrate

that a discharge is a "minor" dispute which must be adjusted under the Act. In actions involving a whistleblower's claim, Congress has expressly determined that such wrongful discharge actions constitute "minor" disputes which must be adjusted within the Railway Labor Act. Congress has thus indicated its intent that all state laws sounding in the "tort of public policy" and relating to interstate railroads must be preempted.

ARGUMENT

A. The Express Statutory Language of the Railway Labor Act Together With the Court's Jurisprudence of the Act Clearly Require that All Employment Disputes Between Employees and Carriers Be Resolved Nonjudicially Under the Act and Not Under State Law

1. The Cardinal Purpose of the Railway Labor Act is to Avoid All Disputes Disruptive to Interstate Commerce

The Railway Labor Act, as amended, 45 U.S.C. § 151 *et seq.* has created an elaborate and specialized administrative dispute resolution scheme intended by Congress to provide a comprehensive federal mechanism for the nonjudicial settlement of all employer-employee disputes which arise in the railroad employment relationship. "It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies." *International Association of Machinists v. Street*, 367 U.S. 740, 760

(quoting *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 752-753 (1945) (Frankfurter, J., dissenting), *aff'd. on rehearing*, 327 U.S. 661 (1946)). A plain reading of the Railway Labor Act leaves no doubt that it was the intention of Congress to have the entirety of labor-management disputes resolved by conference and nonjudicial means as provided for by the mechanisms created in the Act. This cardinal congressional purpose was motivated by Congress's express desire to prevent labor conflicts and strife injurious to interstate railroad transportation and the economy of the nation. Congress recognized that in the process of settling private disputes on the railroads, appreciable consequences to the public may follow. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 552 (1937). "The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern." *Ibid.* at 552. As the Court concluded in *Texas & N.O.R. Co. v. Ry Clerks*, 281 U.S. 548, (1929), "Congress considered it to be 'of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes.'" *Id.* at 561 (quoting *Pennsylvania Railroad Company v. United States Railroad Labor Board*, 261 U.S. 72 (1922)).

The very first stated purpose of the RLA declares the intent of the Act to "avoid ***any*** interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a (1) (emphasis added). In ascertaining the meaning of a legislative provision, the appropriate place to begin is with the language of the enactment itself. *Perrin v. United States*, 444 U.S. 37, 42 (1979). In using the words "avoid any interruption," Congress made it clear that its first and primary priority was to prevent not a few or some interruptions but *any*, i.e., one and all, interruptions and causes of disruption to the peace of railroading in interstate commerce. The avoidance of interruptions to commerce constitutes the *raison*

d'être of the RLA and all its machinery was designed to serve the stated purposes of the Act and prevent labor disputes and strife which may impair the tranquility and peace of the railroads. *International Association of Machinists v. Central Airlines*, 372 U.S. 682, 689 (1963). As this Court held in *Virginian Ry. v. Federation, supra*:

> The Railway Labor Act, § 2, declares that its purposes, among others, are '[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein,' and 'to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions.' The provisions of the Act and its history ... establish that such are its purposes, ***and that the latter is in aid of the former***. What has been said indicates clearly that its provisions are aimed at the settlement of industrial disputes by the promotion of collective bargaining between employers and the authorized representative of their employees, and by mediation and arbitration when such bargaining does not result in agreement. [*Id.* at 553; emphasis added.]

Accordingly, Congress intended that ***any*** labor dispute which would constitute an interruption to commerce and could jeopardize the tranquility of the rails must be subject to the Act's own dispute resolution mechanisms.

2. The RLA Was Designed For the Resolution of All Employer-Employee Disputes

To implement the Congressional purpose of preventing any interruption to commerce, the Act imposes a binding duty upon labor and management to confer in order to resolve all

their differences. Congress has "consistently adhered to a regulatory policy which places the responsibility squarely upon the carriers and the unions to mutually work out settlements ***of all aspects of the labor relationship***. That policy was embodied in the Railway Labor Act of 1926, 44 Stat. 577, which remains the basic regulatory enactment." *Street, supra*, at 740-41 (emphasis added). Section 2 First of the Act, 45 U.S.C. § 152 First makes it the affirmative duty of carriers and their employees and mandates that management and labor must "exert every reasonable effort ... ***to settle all disputes*** *whether arising out of the application of such agreements or otherwise*, in order to *avoid any interruption* to commerce or to the operation of any carrier growing out of ***any dispute*** between the carrier and the employees thereof." *Id.*; emphasis supplied. Similarly, Section Two, Second requires that "***[a]ll disputes*** between a carrier or carriers and its or their employees *shall be considered*, and if possible, decided, with all expedition, in conference. . . ." Emphasis added.

These provisions, it has been held, are not mere exhortations or recommendations but are intended to be obligatory and enforceable. *Chicago & N.W.R. Co. v. United Transportation Union*, 402 U.S. 570 (1963). The obligation to confer and negotiate "is laid on carrier and employees alike ... and in equally plain terms it applies to ***all*** disputes covered by the Act, whether major or minor." *Burley, supra*, at 325 U.S. 725. Likewise, 45 U.S.C. § 152 Eighth requires every carrier to notify its employees that "***all disputes*** between the carrier and its employees will be handled" pursuant to the provisions set forth in § 152. The Act thus creates "a process of permanent conference and negotiation between the carriers on the one hand and the employees through their unions on the other." *Street, supra*, at U.S. 760 (quoting *Burley, supra*, at 325 U.S. 752-753). Quite plainly, then, the express language of the Act mandates that railroad owners and workers must make every reasonable effort available to them and to settle

"*all* disputes" which may exist between them, whether they arise out of the application of a labor contract "or otherwise."

3. The RLA Establishes A Mechanism For the Resolution of All Employer-Employee Disputes By Dividing the Universe of Railroad Disputes Into Two Categories

In the event that a dispute cannot be amicably resolved in conference pursuant to 45 U.S.C. § 152 First and Second, the Act establishes specific mechanisms to handle such situations, each depending on the typing of the dispute into one of two categories. In this regard, Congress divided the total universe of all railroad disputes into those concerning rates of pay, rules, or working conditions, 45 U.S.C. § 151a (4), known as "major disputes", and those growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions, 45 U.S.C. § 151a (5), known as "minor disputes." As the Court succinctly put it, "major disputes seek to create contractual rights, minor disputes to enforce them." *Consolidated Rail Corporation v. Railway Labor Executives' Association*, 491 U.S. 299 (1989) at 302. Under the Act unresolved major disputes are referred to the National Mediation Board, 45 U.S.C. § 155 First, whereas minor disputes are subject to the National Railroad Adjustment Board ("NRAB"). 45 U.S.C. § 153 First (i).

In referring unsettled labor disputes to the NRAB, the Act directs that these disputes must be those "growing out of grievances ***or*** out of the interpretation ***or*** application of agreements concerning rates of pay, rules, ***or*** working conditions." *Id.* (Emphasis added.) This language in § 153 First (i), however, does not exist independently of other provisions in the Act and is identical to the language in § 151a (5) ("general purposes)" which, together with § 151a (4) constitute the universe of all disputes which Congress was

seeking to guard against and regulate in implementing the primary purpose of the Act, namely "[t]o avoid any interruption to commerce or to the operation of any carriers engaged therein." § 151a (1). Thus, what Congress clearly intended in the Act was that any dispute which did not fall within § 151a (4) would fall within the jurisdiction of the NRAB. In other words, any dispute which is not a "major dispute" must *ipso facto* be a "minor dispute" and fall under § 151a (5) and be subject to Adjustment Board jurisdiction.[2]

The logic underlying this scheme is simple and consistent with the overall purpose of the Act: Congress meant for *all* disputes of potential disruptive impact on commerce and carriers to be regulated by the Act. Congress then divided this world of disputes into "major" and "minor" disputes and created mechanisms to address each within the framework of the Act. A dispute defined as "minor" under § 151a (5) must be finally and conclusively resolved by the NRAB under § 153 First (i) whereas a "major dispute" is to be mediated by the National Mediation Board pursuant to § 155. To conclude otherwise would effectively create a third class of disputes in contraindication to the language of the

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[2] Section 3 Second of the Act, 45 U.S.C. § 153 Second, also permits the resolution of disputes by Special Boards of Adjustment, created voluntarily by mutual consent of union and management, to decide "disputes of the character specified [in § 153]." *Id.* Such boards, which may take a variety of forms, such as system, group or regional boards of adjustment, may be dissolved upon 90 days' notice to the other party and, thereafter, dispute resolution returns to the NRAB. *Id.*

Section 3 Second, as amended in 1966 by Pub. L. 89-456, also requires the establishment of Public Law Boards of Adjustment upon the written request of either the carrier or the union. Special and Public Law Boards awards are "final and binding upon both parties to the dispute," *Id.*, and are enforceable in district court in the same manner as awards of the NRAB. *Id.*

Act. In *Conrail, supra*, at 299, the Court explicitly declined to create such a third type of railroad dispute, stating, "we shall not aggravate the already difficult task of distinguishing between major disputes and minor disputes by adding a third category of hybrid disputes." *Id.* at 310.

4. Congress Intended That All "Minor" Disputes Be Resolved By the Railroad Community

The resolution of all unresolved "minor disputes" under the Act was expressly entrusted by Congress to the NRAB, a body exclusively composed of railroad's workers and managers. In doing so, Congress recognized that the world of railroading is unique among the trades, with an insular work culture difficult for outsiders to understand yet alone enter and resolve railroad grievances.[3] As the Court concluded in *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366, (1955), "Both its history and the interests it governs show the Railway Labor Act to be unique. 'The railroad world is like a state within a state. Its population ... has its own customs and its own vocabulary, and lives according to rules of its own making.'" *Id.* at 371 (quoting Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567, 568-69 (1937). Consistent with this understanding, Congress established a dispute resolution system composed only of railroad's labor and management.

[3] As noted by Representative Arentz during the 1926 debate on the Act, "[i]n the operation of a railroad ... minor disputes, involve discipline, grievances, and disputes over the application and meaning of an agreement. These disputes are of a character to be understood by those who operate the railroad and those who work on the railroad, and often very difficult for an outsider to grasp." [67 CONG. REC. 4499-4526 (1926) *reprinted in* Senate Rep. 93d Cong., 2d Sess. (1974), LEGISLATIVE HISTORY OF THE RAILWAY LABOR ACT AS AMENDED (1926 THROUGH 1966), at 359 (1974).]

Intending that the NRAB be made up only of industry people, Congress composed the Board of an equal number of members to be designated by carriers and unions, 45 U.S.C. § 153 First (a), as selected by the respective parties of their own accord, 45 U.S.C. § 153 First (b) and (c), with conflicts ultimately resolved by the National Mediation Board. 45 U.S.C. § 153 First (d)-(f). Indeed, demonstrating the complexity inherent within the railroad industry, Congress structured the NRAB into four subunits, each responsible for a particular type of railroad metier. As the Court stated in *Union Pacific Railroad v. Price*, 360 U.S. 612 (1959),

> the employees considered that their interests would be best served by a workable statutory scheme providing for the final settlement of grievance by a tribunal composed of people experienced in the railroad industry. The employees' representatives made it clear that, if such a statutory scheme were provided, the employees would accept the awards as to disputes processed through the scheme as final settlements of those disputes which were not to be raised again. [*Id.* at 614.]

The language and structure of the Act thus reveals Congress's intent that the NRAB, made up of railroad's owners and workers, resolve without any outside interference all disputes arising on the roads which are not typed as "major disputes."[4] As such, the awards made by the NRAB have been decreed by Congress to be final and binding upon both parties to the

[4] Consistent with Congress's intent that all disputes on the roads be self-adjusted by the railroads and unions without outside interference, Congress in Sections 7, ., 9, 45 U.S.C. §§ 157, 158, 159, also created a voluntary mechanism for final and binding arbitrations, separate from the mandatory adjustment mechanisms in the Act.

dispute, 45 U.S.C. § 153 First (m), and the Court has emphasized this time and time again. *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 368 U.S. 257, 263 (1965).

5. The Language of the Act Forbids the Removal of Employer-Employee Dispute Resolution Out of the Railroad Industry

Clearly, then, the Act by its inherent structure and constitution, forbids minor disputes to be removed out of the railroad industry for decision. Even where the members of the NRAB are deadlocked or cannot make an award, the Act requires the deadlocked NRAB division to appoint of its own choosing a referee who will be brought in to "sit with the division as a member thereof and make an award." 45 U.S.C. § 153 First (l). Notably, even in the face of deadlock, congressional insistence on maintaining all dispute resolution within the railroad industry is strongly apparent. The Act creates a scheme where, instead of exporting elsewhere a deadlocked dispute for resolution by an outsider, a referee is selected by the parties themselves and is brought *in* to sit as a full NRAB division member to hear the case together with its railroad industry members, who can confer with, educate and seek to convince the referee, prior to the latter's casting of the tie-breaking vote which will decide the dispute *for* the division.[5] Similarly, in cases involving public law boards, Congress made it clear that refusal of a party to submit to the dispute resolution process will not be tolerated and the National Mediation Board will appoint an individual for the recalcitrant party. 45 U.S.C. § 153 Second. This simple yet compelling facet of the Act must be viewed as strong and

[5] In cases where the NRAB cannot agree on such a referee, the Act permits the National Mediation Board to appoint such a referee to join the division and decide the case. 45 U.S.C. § 153 (l).

clear manifestation of congressional intent that all disputes arising in the railroad industry must be resolved only within this industry, unless Congress clearly indicates otherwise.

From the Act's express language, it is clear that Congress was determined to keep railway disputes out of the courts and thereby allow the industry to adjust its own disputes with little judicial interference. "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Union Pacific Railroad v. Sheehan*, 439 U.S. 94, (1979) (quoting *Trainmen v. Chicago River. & Indiana R. Co.*, 353 U.S. 30, 40 (1957)). In such actions, "the findings and order of the division of the Adjustment Board shall be conclusive on the parties. . . ." 45 U.S.C. § 153 First (p). In this regard, § 153 First (p) permits actions in United States District Court to enforce awards by a board of adjustment but on exceptionally narrow grounds. A district court may set aside an order by the Board only for failure of the division to comply with the requirements of the Act; for failure of the Board to conform or confine itself to matters within the scope of the division's jurisdiction; or, for fraud or corruption. *Id.* Likewise, the review afforded by 45 U.S.C. § 153 First (q) in district court is exceptionally narrow and based on the same criteria as in § 153 First (p). In *Sheehan, supra*, at 439 U.S. 89, (1979) the Court noted that the scope of judicial review of Adjustment Board decisions is "among the narrowest known to the Law." *Id.* at 91. Without equivocation, the Act's language instructs that the courts of the United States have few and constricted powers of review under the Railway Labor Act.[6]

[6] In this context, the dissent of Justice Frankfurter in *Burley* is enlightening. Justice Frankfurter wrote: "the policy of the legislation, derived from a long painful experience, is to keep labor controversies on the railroads out of the courts except in the few specifically defined situations where Congress has put them into the courts. Congress has

The Railway Labor Act was enacted for the benefit of carriers, employees and the public, *Transportation-Commun. Emp. U. v. Union Pacific*, 385 U.S. 158, 164 (1966). In so doing Congress created a dispute resolution system delicately balanced between the interests of these three groups, complete in itself, and which the Court has characterized "provides a comprehensive framework for the resolution of labor disputes in the railroad industry." *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 562 (1987).[7] On its face, the Act provides minimal involvement by the courts of the United States, a clear reflection of congressional intent to contain all dispute resolution exclusively within the Act. To interpret the Act's scheme as allowing the involvement of state and local courts in railway labor disputes is entirely inconsistent with the language of the Act and with this Court's jurisprudence.[8]

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made a departure in the Railway Labor Act from the normal availability of judicial remedies, and we ought not read the new law through the spectacles of the old remedies." *Burley, supra*, at 327 U.S. at 677; emphasis added. These words by Justice Frankfurter resonate validly today and are probative to the question now before the Court.

[7] The Act constitutes a complete and self-contained package agreed to by carriers and labor to settle their disputes peacefully. The delicate balancing of interests made by Congress and the various compromises made by labor and management in return for the ultimate structure of the Act require no modifications or alterations. The Act "is a complicated but carefully devised scheme for adjusting the relations between the two powerful groups constituting the railroad industry. It misconceives the legislation and mutilates its provisions to read into it common law notions for the settlement of private rights." *Burley, supra*, at 325 U.S. 758 (Frankfurter dissenting).

[8] Notably, while review of NRAB and adjustment boards is limited, it has been held that in post-arbitral award situations the courts may, in exceptional instances, set aside awards which violate clearly established public policy. *Cf. United Paperworking International Union v. MISCO, Inc.*, 484 U.S. 29, 43 (1987); *Cf. W.R. Grace & Co. v. Rubber Workers*, 461 U.S.757, 766 (1983); *Delta Air Lines v. Air Line Pilots*, 861 F.2d

6. Congress Intended that the RLA Preempt State Employment Law

As is evident from the preceding discussion of the Act, Congress intended for the Railway Labor Act extensively and comprehensively to occupy the field of railroad labor disputes. As the Court noted, "[t]he framework for fostering voluntary adjustments between carriers and their employees in the interest of the efficient discharge by the carriers of their important functions with minimum disruption from labor strife has no statutory parallel in other industry. That machinery, the product of a long legislative evolution, is more complex than that of any other industry." *Street, supra*, at 367 U.S. 755. Nor have the states engaged in regulating this industry. As the Court further held,

> There is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry. Moreover, the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system. In particular, Congress long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy. A disruption of service on any portion of the interstate railroad system can cause serious problems throughout the system. [*United Transportation Union v. Long Island Railroad Company, supra* at 455 U.S. 688.]

665, 671 (11th Cir. 1988), *cert. denied* 110 S.Ct. 201 (1989); *Northwest Airlines v. Air Line Pilots Assn. Intern.*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied* 486 U.S. 1014 (1988); *Union Pacific R. Co. v. United Transportation Union*, 3 F.3d 255, 258-260 (8th Cir. 1993).

As it is clear that, in creating the RLA, Congress determined to regulate the industrial relations of this entire industry, preemption of state laws which intrude into this field is required. In analyzing whether state law has been preempted by a federal enactment, "'[t]he purpose of Congress is the ultimate touchstone.'" *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). By virtue of the Act's own clear scheme of dividing all disputes into major and minor disputes and resolving them within the framework of the RLA and, pursuant to this Court's long jurisprudence finding congressional intent to occupy the field of railroad regulation and labor relations, *Street, supra*, it must be concluded that Congress has preempted the field from state participation and intervention. The United States Constitution Art. VI, cl. 2 provides that "the Laws of the United States ... shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

In this case, Congress, through the extensive and comprehensive nature of the Act, has determined that all railroad labor disputes arising between employees and carriers must be governed by the RLA, no labor dispute having been left for the states' jurisdiction. "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Cipollone v. Liggett Group, Inc.* _____ U.S. _____, 112 S.Ct. 2608 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). "In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law [citations omitted] or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone v. Liggett, supra,* at 112 S.Ct. 2608 (quoting *Fidelity Federal Savings & Loan Assn. v. De La Cuesta,* 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). It is hence clear that the language of the Act federalizes all disputes between carriers and their employees and preempts state resolution of labor-management disputes.

7. The RLA is One Part of A Vast Congressional Scheme Regulating the Railroad Industry

Further support for the preemption of state law is found in the positioning of the Railway Labor Act in the midst of a vast field of railroad laws enacted by Congress. The Railway Labor Act, is one part of a whole expansive statutory scheme created by Congress to regulate the nation's railroads. For decades, this vast congressional regulatory scheme has defined the legal rights and obligations of railroad employers and employees with respect to one another as well as their obligations to the public at large. "Railroads have been subject to comprehensive federal regulation for nearly a century", *Long Island RR, supra*, at 455 U.S. 687 and "[t]here can be no serious question that ... the Commerce Clause grants Congress the plenary authority to regulate labor relations in the railroad industry in general." *Id.* at 682-83. Executing its constitutional powers under the Commerce Clause, Congress wove a tight legislative fabric designed to cover all interstate rail transportation by enacting a set of related and interdependent laws controlling every facet of life on the railroads. As the Court has observed, "the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system." *Id.* at 688. The net effect of these congressional enactments has been conclusively to federalize railroad law and remove this substantive area from regulation by the states. The history of congressional railroad enactments clearly demonstrates the

pervasive presence of federal law.[9]

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[9] Recognizing the vital importance of the railroad industry to the national economy, in 1862 Congress enacted the Pacific Railroad Act of 1862, c. 120, 12 Stat. 489, enabling the building of a transcontinental rail system by granting the railroads rights of way through public lands. *See Ames v. Kansas ex rel. Johnston*, 111 U.S. 449, 450 (1884). To regulate and integrate the nation's rail and shipping network into one cohesive national system of transportation, Congress enacted the Interstate Commerce Act of 1887, 24 Stat. 379, creating over one hundred years ago a comprehensive federal scheme to regulate the railroad industry through the Interstate Commerce Commission (ICC). *See United States v. Pennsylvania R.*, 323 U.S. 612 (1945). To deal with railroad labor disputes, in 1888 Congress passed the Arbitration Act of 1888, 25 Stat. 501, which was intended to bring peace to the battles between railroad owners and employees which were viewed as deleterious to the national rail system. *See Street, supra*, at 367 U.S. 756 n. 11 (1961). In 1893, Congress legislated the Safety Appliance Acts, c. 196 §1, 27 Stat. 531 to require and regulate safety equipment on interstate railroads. In 1898, dissatisfied with the lack of peaceful labor relations on the roads, Congress returned to the railroad labor arena and enacted the Erdman Act, c. 370, 30 Stat. 424, which created a voluntary system of mediation and arbitration of railroad disputes.

With the dawn of the twentieth century in 1907, Congress enacted the Hours of Service Act, c. 2939, § 1, 34 Stat. 1415, limiting the duty hours of various types of railroad employees and thereby improving safety and working conditions. *See Chicago & Alton R.R v. United States*, 247 U.S. 197 (1918); *Atchison, Topeka & Santa Fe Ry. v. United States*, 244 U.S. 336 (1917). In 1908, Congress passed the Employers' Liability Act, c. 149, § 1, 35 Stat. 65, regulating and standardizing personal injury actions by railroad employees against the railroads. In 1913, Congress once again returned to the labor area and enacted the Newlands Act of 1913, c. 5, 38 Stat. 103, repealing the Erdman Act of 1898 and providing for a new manner of voluntary mediation and arbitration of railroad labor disputes. In 1916, to avert a strike by four railway unions, Congress passed the Adamson Act, c. 436, § 1, 39 Stat. 721, mandating the eight-hour work day for certain types of employees and railroads. *See Wilson v. New*, 243 U.S. 332, 340-45 (1917); *Burke v. Monumental Division, No. 52, Brotherhood of Locomotive Engineers*, 273 F. 707 (D.C. Md. 1919).

In December 1917, during the First World War, the President by

Congress has for over one hundred years regulated all aspects of RR life as manifested by the breadth and depth of its railroad enactments in the last century. As the Sixth Circuit concluded, "Congress has undertaken the regulation of almost all aspects of the railroad industry, including rates, safety, labor relations, and worker conditions. This lasting history of pervasive and uniquely tailored congressional action indicates Congress's general intent that railroads should be regulated primarily on a national level through an integrated network of federal law." *R.J. Corman R. Co. v. Palmore*, 999 F.2d 149 (6th Cir. 1993). As this Court said in *California v. Taylor*, 353 U.S. 564 (1957), "Like the Safety Appliance Act, the Railway Labor Act is 'all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action.'" *Id.* (quoting *United States v. State of California*, 297 U.S. 175, 186 (1936)).

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authority of an Act of Congress, 1916, c. 418, 39 Stat. 619, 645, took over the railroads of the country and operated them through the Director General of Railroads until March 1, 1920. Following the War, Congress enacted the Transportation Act of 1920, c. 91, 41 Stat. 456, which returned the railroads to private ownership and established a new railroad dispute resolution mechanism to replace the Newlands Act of 1913. In 1926, Congress legislated the Railway Labor Act of 1926, c. 347, Title I, § 1, 44 Stat. 577, which replaced the dispute resolution mechanism of the Transportation Act of 1920. In 1934, Congress passed the Railroad Retirement Act of 1934, c. 868, § 1, 48 Stat. 1283, providing railroad employees with federal retirement benefits and in 1938, Congress enacted the Railroad Unemployment Insurance Act, c. 680, § 1, 52 Stat. 1094, legislating federal unemployment benefits to railroad employees. In 1970, Congress passed the Railroad Safety Act of 1970, 45 U.S.C. § 421, to standardize rail safety and reduce accidents and, finally, in 1973, Congress enacted the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701, which, following the bankruptcy of eight major railroads, reorganized the entire collapsed eastern and midwestern railroad industry into Conrail to prevent disruption to interstate commerce. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

Preemption of state law in this case is warranted as a result of Congress's far reaching and thorough occupation of the railroad field. Congressional regulation in this field entails much more than safety regulation and includes social legislation intended to ameliorate the lives of railroad workers and their families. Such enactments as the Railroad Retirement Act, the Railroad Unemployment Insurance Act, FELA, the Adamson Act, the Hours of Service Act, and the Railway Labor Act form together a cohesive net regulating the non-safety aspects of the railroad industry. This set of federal laws strongly suggests that federal law so thoroughly occupies the legislative field that preemption is required. *Cipollone v. Liggett, supra.* As this Court declared, "[t]o allow individual states...to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system." *Long Island RR, supra,* at 455 U.S.689. For these reasons, the Court should presently hold that, in the context of the Railway Labor Act, state wrongful discharge law is preempted.

B. The Jurisprudence of the Court Requires That Wrongful Discharge Causes of Action be Preempted as Such Actions Constitute Minor Disputes Under the Railway Labor Act

1. *Conrail* Establishes The "Arguably Justified" Test For Minor Disputes

In *Conrail, supra,* the most recent opinion involving the definition of a "minor" dispute, the Court clarified the manner by which a distinction may be made between "major" and "minor" disputes:

> We hold that if an employer asserts a claim that the parties' agreement gives the employer the discretion to make a particular change in working conditions without prior negotiation, and if that claim is ***arguably justified by the terms of the parties' agreement (i.e., the claim is neither obviously insubstantial or frivolous, nor made in bad faith),*** the employer may make the change and the courts must defer to the arbitral jurisdiction of the board. [*Conrail, supra,* at 491 U.S. 310; (emphasis added).]

In announcing this test for analyzing disputes as "major" or "minor," the Court highlighted that the "arguably justified" test imposes a "'relatively light burden which the railroad must bear[] in establishing exclusive arbitral jurisdiction under the RLA." *Id.* at 307 (quoting *Brotherhood of Maintenance of Way Employees v. Burlington Northern R. Co.,* 802 F.2d 1016, 1022 (8Cir 1986). A carrier arguing that its action against an employee is "arguably justified" by the terms of the parties' contract, can demonstrate such an assertion of arguability with a showing that its reliance on the contract is not frivolous, or is not obviously insubstantial, or is not made in bad faith. Demonstrating any one of these elements permits a dispute to be adjusted as a minor dispute under the exclusive jurisdiction of the NRAB pursuant to 45 U.S.C. § 153 First (i). "Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major." *Conrail* at 307. [10]

Prior to adopting the "arguably justified" test, the

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[10] As *Conrail* points out with approval, other courts have utilized terms such as "spurious" and "frivolous" to convey the exact same standard reached by the Court. *Conrail* at 306-07.

Conrail Court reviewed in passing *Burley's* minor dispute test, noting that,

> *Burley* looks to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action. The distinguishing feature of such a case is that the dispute may be conclusively resolved by interpreting the existing agreement. [*Conrail* at 305.]

Respondent and the Solicitor General argue that with these comments about the *Burley* test, the Court created a new test for minor disputes. This contention is misguided as it ignores the express holding by the *Conrail* Court, expressly establishing the "arguably justified" test. The Respondent's words are thus simply out of context. The first sentence above paraphrases the language in *Burley* which provides that a minor dispute, "[c]ontemplates the existence of a collective agreement already concluded . . . [and] [t]he dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation. . . ." *Burley, supra,* at 325 U.S. 723. The second sentence in the above *Conrail* quote reflects upon and comments on the *Burley* test's potential effect, noting that in such situations a dispute ***"may be*** conclusively resolved" by interpreting the contract of employment. As the language of "may be" is not in the imperative form but, rather is conjectural and permissive, this phrase cannot reasonably be accorded the interpretation sought by respondent: that a grievance *must* always be conclusively resolved before being typed as a minor dispute. Quite simply, respondent and his *amicus*, the Solicitor General, seek to extract from this language far more than what the words contain.

Indeed, the argument of respondent and the Solicitor

General that *Conrail* has created a "conclusively resolved" preemption test, has no support in the *Conrail* decision. Rather, in *Conrail* the Court strengthened the RLA in reaffirming that in the railroad industry the universe of employee-employer disputes may only be divided into two classes, "major" and "minor" disputes, and that such disputes must be resolved exclusively within the confines of the Act. Nowhere in *Conrail* does the Court create or contemplates creating a new class of railroad labor cases to be decided in state courts. Quite the opposite, in rejecting an invitation by the union to create a third class of "hybrid" disputes, the *Conrail* Court pointedly wrote, "we shall not aggravate the already difficult task of distinguishing between major disputes and minor disputes by adding a third category of hybrid disputes." *Conrail, supra,* at 491 U.S. 310. Quite clearly, then, the *Conrail* Court had absolutely no intention of creating a new class of disputes to supplement the two already present in the Act. As such, there is an incongruity in logic in concluding, as Respondent and the Solicitor General conclude, that *Conrail*, while expressly rejecting the creation of a new class of disputes within the RLA has -- with two words ("conclusively resolved") -- broken new ground and created a new class of railway labor disputes *outside* the Act under state jurisdiction. Quite obviously, had the Court intended to alter a guiding and fundamental polestar of railway labor law, *i.e.*, that of keeping courts out of the railroad industry's labor relations and encouraging adjustment of disputes, by permitting *state courts* to regulate the railroads' labor relations, the Court would have so stated in a manner clear and certain.

2. *Conrail* Follows From The Court's Prior Jurisprudence

The Court's holding in *Conrail* continues in the footsteps of *Burley*, *Day*, and *Sheehan* and is entirely

consistent with *Andrews*. In its decision in *Andrews v. Louisville & Nashville Railroad*, 406 U.S.271 (1972), this Court reversed *Moore v. Illinois Central R. Co.*, 312 U.S. 630 (1941), and held that a railroad employee's wrongful discharge state cause of action was preempted by the Railway Labor Act. The Court made it clear that the RLA's grievance and arbitration procedures are mandatory and must be utilized by employer and employee alike, *Id.* at 322, and, the characterization of a claim by an employee as one for "'wrongful discharge' does not save it from the Act's mandatory provisions for the processing of grievances." *Id.* at 324-25. Additionally, by virtue of its ruling, the Court implicitly acknowledged that in some situations, the exclusive administrative remedy mandated by the Act would preclude other remedies available elsewhere. *Id.* at 325.

In *Pennsylvania Railroad Company v. Day*, 360 U.S. 554 (1959), where NRAB jurisdiction was found in an action for backpay by a retired employee, the Court ruled that railway labor disputes "***arising out of the relationship*** between carrier and employee," constitute minor disputes which are subject to the exclusive jurisdiction of the NRAB under the Act. *Id.*at 360 U.S. 554; (emphasis added). The Court stated, "[t]he purpose of the Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated." *Id.* at 552. Similarly, in *Burley, supra*, the Court ruled that a minor dispute, "relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case . . . found upon *some incident of the employment relation, or asserted one*, independent of those covered by the collective agreement. *Id.* at 325 U.S. 723 (emphasis added). Additionally, in *Sheehan, supra*, the Court noted that minor disputes cover "grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions." *Id.* at 95.

On the basis of *Andrews*, *Day*, *Sheehan*, *Burley* and *Conrail* it would appear that a dispute relating either to the meaning or proper application of a contractual provision or "arising out of" or "found upon some incident of the employment relation, or asserted one" would be subject to exclusive NRAB jurisdiction even if labeled as an action in wrongful discharge. These cases taken together dictate that any railroad wrongful discharge action, based in contract, tort or public policy, is preempted, regardless of the characterization rendered by the complainant as, by definition, an action challenging a discharge is based on some incident of the employment relationship and the gravamen of the action is the discharge from the employment relationship. As the gravamen of a wrongful discharge action is the termination of the contractual employment relationship, carriers need only demonstrate that, arguably, a termination of the contractual relationship or another adverse employment action was neither obviously insubstantial or frivolous, nor made in bad faith. Once this "relatively light burden," *Conrail, supra*, at 491 U.S. 306, is met, the dispute must come under the jurisdiction of the NRAB.

3. A Wrongful Discharge Action Is "Arguably Justified" By The Employment Contract

That the gravamen of a wrongful discharge action, including a whistleblower's action, lies in the employment relationship is clear. The generic cause of action known as "wrongful discharge", while not new on the scene, contains the "public policy tort" doctrine which, until recently, was unknown. H. Perritt, EMPLOYMENT DISMISSAL LAW AND PRACTICE §1.1, at 3 (1992). This type of tort permits a dismissed employee to recover for the dismissal itself, as opposed to the consequences of the dismissal, *e.g.*, defamation. *Id.* at §5.1 at 431. Under the public policy tort doctrine, a dismissal is actionable only when the action

violates a clearly established public policy and, generally, a court must balance the interests of the employee, the employer and the public to determine liability. In this balancing, the employer's interest to discharge the employee, either for cause or in at will situations, is a crucial element in the employer's defense. Integral to the liability analysis is the motive which the employer possessed in effectuating the dismissal; if the employer demonstrates that a personnel action was motivated by a valid business reason, as opposed to the plaintiff's alleged illicit reason, the employer prevails. Only after hearing the employer's explanation and justification for the personnel action can the matter be resolved on the merits. *See id.*at § 5.9 ("Public Policy Tort: Basic Structure of Proof) and § 5.22 ("Burden of Proof on Reasons for the Dismissal and Mixed Motive Problem). In a case where the employment relationship is governed by a collective bargaining agreement, that contract will be the basis for a defense that the employee was discharged for cause.[11] Therefore, there can be no question that wrongful discharge actions "arguably" relate to the employment contract and that such actions must be typed as minor disputes under the Railway Labor Act.

4. Congress Determined Whistleblower Actions To Constitute Minor Disputes

Indeed, this same conclusion was adopted by Congress when it determined to type a railroad whistleblowing as a

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[11] While the states which have adopted the public policy tort are split, some have adopted the *Burdine* Title VII model of shifting burdens where: the employee makes his case for a violation of public policy, followed by the employer who defends by demonstrating that the dismissal was justified and job-based, and back to the employee who seeks to show that the employer's justification as being pretextual. *See Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash 1984); *see also Phipps v. Clark Oil & Ref. Co.*, 408 N.W.2d 569 (Minn 1987).

minor dispute. In the Federal Railroad Safety Act of 1970, as amended, 45 U.S.C. § 421 *et seq.*, Congress enacted a whistleblower's provision which protects railroad employees from adverse action due to the filing of a safety complaint. 45 U.S.C. § 441 (a). Congress has made this provision enforceable under the RLA before the Adjustment Board which can award aggrieved employees reasonable damages, including punitive damages of up to $20,000. 45 U.S.C. §441 (c)(2). *See Rayner v. Smirl*, 873 F.2d 60 (1989) (holding that §441 preempted state cause of action for wrongful discharge). Notably, the legislative history of §441 amply demonstrates that a whistleblowing cause of action existed under the Railway Labor Act well before its formal statutory enactment. As the legislative history reflects, Congress understood that retaliatory discharge claims were already subsumed within the remedies afforded by the RLA, where reinstatement and back-pay remedies were available. The legislative history also supports a conclusion that retaliatory discharges or retaliatory job personnel actions were viewed by Congress as an intolerable form of discrimination and harassment to be adjusted under the RLA. In this respect, the report by the Senate's Transportation Committee states, "[t]he Committee is opposed to discrimination or harassment of railroad employees for any reason. In particular, harassment of an employee for reporting or testifying regarding a safety violation should be strongly discouraged." S. Rep. No. 100-153, 100th Cong., 2d Sess. 12 *reprinted in* 1988 U.S. CONG. & ADMIN. NEWS 695, 706.

5. *Colorado* and *Lingle* Are Inapplicable Here

As Congress indicated its intention in §441 to protect railway workers from discrimination and harassment by using the mechanisms of the RLA, it is reasonable to conclude that Congress intended that all such state causes of action, including those involving race, sex, national origin, and

handicap discrimination, be subject to the RLA's dispute resolution mechanisms. While respondent and the Solicitor General may point to *Colorado Anti-Discrimination Comm'n. v. Continental Airlines*, 372 U.S. 714 (1963) for the proposition that race discrimination causes of action are not preempted by the RLA, the use of this case is misplaced. *Colorado* involved a pre-hiring situation, involving an applicant for employment. The Railway Labor Law, however, does not cover under its scope persons who wish to one day become railroad or airline workers. [12] For these reasons, *Colorado* is distinguishable and should be read as barring state regulation after the employment relationship commenced.

Even assuming *Colorado* could be read to apply in pre-hire situations, given developments in the law [13] and the Court's decision in *Gilmer v. Interstate/Johnson Lane Corporation* , 111 S.Ct. 1647 (1991) it is appropriate to conclude that arbitral tribunals should handle civil rights grievances under the Act.

In *Gilmer*, the Court strongly rejected challenges to the adequacy of arbitral proceedings and held that, pursuant to a

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[12] The RLA expressly defines "employee" as "every person in *the service of a carrier* ... who performs any work defined as that of an employee...." 45 U.S.C. § 151 Fifth; (emphasis added).

[13] The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, §118 (42 U.S.C.A. §1981 Note) provides: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlements, negotiations, conciliations, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." Virtually identical provisions appear in the Americans with Disabilities Act of 1990, 42 U.S.C. § 12212.

contract containing a mandatory arbitration provision, statutory claims must be arbitrated. Because Congress granted the NRAB the power to make money awards, to order reinstatement of wrongfully terminated employees, 45 U.S.C. § 153 First (o), to issue written awards, and to have parties be heard with the assistance of counsel,45 U.S.C. § 153 First (j), the basic requirements of *Gilmer* with respect to the adequacy of the arbitral forum are fulfilled under the RLA.

Lastly, Respondent's reliance on *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), and its preemption standard under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 185, is misplaced. While there may be some broad and general similarities between labor codes such as §301 and the Railway Labor Act, LMRA's §301 belongs to a profoundly different statutory scheme and its principles cannot be imported wholesale into the railway labor arena. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969) In enacting the National Labor Relations Act, 29 U.S.C. § 151 ("NLRA") as amended by LMRA in 1947, Congress "carved this singular industry out of [LMRA]," *California v. Taylor, supra*, at 353 U.S. 565, and expressly excluded railroad employees from coverage by LMRA and NLRA. 29 U.S.C. § 182. Additionally, in 29 U.S.C. § 185(a) Congress expressly allowed employer-employee contract disputes to be brought in federal court under §301, placing no requirement that arbitration must be included in a collective bargaining agreement. In contrast to LMRA, under the Railway Labor Act Congress decreed that all "minor" grievances must be subject to final and binding adjustment as specified in the Act.

In short, this Court has held that minor disputes under the RLA include causes of action which sound in wrongful termination. Simply because a new tort doctrine arrives on the scene and is utilized to challenge a dismissal does not alter the

underlying premise of the action as one originating out of the employment relationship or, arguably rising from the contract of employment. For these reasons, the Court should hold that wrongful discharge actions are minor grievances under the RLA and are preempted.

CONCLUSION

For the reasons set forth herein, the decision of the Supreme Court of Hawaii should be reversed.

Respectfully submitted,

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